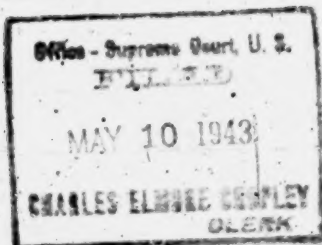


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IN THE
**Supreme Court of the
United States**

No. 923

12

OCTOBER TERM, 1942

W. J. MEREDITH, JAMES G. MARTIN and A. R.
OHMART,

Petitioners.

versus

THE CITY OF WINTER HAVEN, a municipal corpo-
ration, et al.,

Respondents.

**REPLY BRIEF OF PETITIONERS IN
SUPPORT OF PETITION
FOR WRIT OF
CERTIORARI**

D. C. HULL
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In General

Notwithstanding anything set forth in the Opposition Brief of the Respondents, it appears to be quite important that this Court decide (a) whether the Federal Courts should not adjudicate the controversy here presented rather than require the entire matter to be re-litigated in the State Courts and (b), what effect the overruling State Court decisions have on contract rights acquired prior to the rendering of the overruling decisions, it appearing that the highest State Court has adopted and never receded from the "principle of reliance" or "contract exception" laid down in

Gelpcke v. Dubuque, 1 Wall. (U.S.) 175, and that this Court decide (a) whether the petitioners' bond contract is or is not "illegal or unenforceable," in whole or in part, and (b) if it is adjudged "illegal or unenforceable," in whole or in part, whether and to what extent the petitioners, who have invoked the Federal jurisdiction, are entitled to be remitted to their interest rights under the bonds surrendered in exchange for the refunding bonds, that question not having been foreclosed against them by any decision in the State Courts, and such right of "subrogation" being in harmony with the opinions of the highest State Court on the subject.

Some of these questions, if not all of them, are of great public importance and interest.

The fact that the members of the Circuit Court of Appeals hold divergent views is indicative of the importance of these questions, just as much so as if two different Circuit Courts of Appeals had rendered conflicting decisions.

It appearing that the highest State Court had construed amended **Section 6**, of **Article IX**, of the **Florida Constitution**, before the petitioners' bond contract rights were acquired, and has construed it in an entirely different way after such rights were acquired, and it further appearing that the State Court has consistently adhered to the "principle of reliance" or "contract exception" announced in the **Gelpcke case**, it is important that this Court decide which of "the laws" of Florida, as defined by the highest Court of the State, "shall be regarded as rules of decision," as provided by **Section 34**, of the **Federal Judiciary Act**, 28 U.S.C.A. **Section 725**.

And since it is true that the questions at issue have been submitted to the Federal Courts by the parties in interest, without objection or protest, and have been fully litigated there, and since, as Judge Sibley has pointed out, the case "involves no invasion of high State functions or policies as to which caution is due," no good reason is seen as to why the parties litigant should be required to relitigate the matter in the State Courts; especially in view of the public importance of the questions involved.

Respondents' Contentions Answered

It is respectfully submitted that the first of the "seven conclusions" of the majority of the Circuit Court of Appeals, mentioned by respondents, that "every question presented for decision . . . is a question of state cognizance to be determined under controlling state law" is incorrect, and that this case presents the controlling question of which of "the laws" of the State of Florida, as announced by the highest State Court, "shall be regarded as rules of decision," in the Federal Courts. That is to say, is it "the law" as declared when the petitioners' contract rights were acquired that is to be applied in determining such rights, or is it "the law" as declared after such contract rights had been acquired?

It appears that the respondents are not in agreement with the second of the "seven conclusions" upon which they state the decision of the majority of the Circuit Court of Appeals rests.

The majority opinion holds that the state of the law in Florida "is not clear, settled and stable."

It appears that the respondents do not agree, but that they rather contend that there is no conflict at all between the earlier and the later decisions.

If, as respondents contend, the decision in the *Sullivan* case (101 Fla. 298; 134 So. 211) is not in conflict with the decisions of the Florida Court in *Outman v. Cone*, 141 Fla. 196, 192 So. 611, *Taylor v. Williams*, 142 Fla. 402, 195 So. 175, 142 Fla. 562, 195 So. 184, *State v. Special Tax School District No. 3*, 143 Fla. 557, 197 So. 127, *Andrews v. Winter Haven*, 148 Fla. 144, 3 So. 2nd 805, *State v. City of New Smyrna Beach*, 148 Fla. 482, 4 So. 2nd 660, then the majority of the Circuit Court of Appeals was incorrect in its holding that the law of Florida on the matters in issue "is not clear, settled and stable," and the Circuit Court of Appeals should have decided this case in accordance with the decision of the Supreme Court of Florida in the *Sullivan* case.

Even if it should be admitted that the laws of Florida in relation to what respondents term "the principal prayer of petitioners" is "not clear, settled and stable," it cannot

NOTE: Emphasis has been supplied in some of the quotations in this brief.

be asserted that the Florida law with reference to the right of the petitioners to be subrogated to the position of holders of original bonds, in the event the refunding bonds should be declared illegal or unenforceable, in whole or in part, is not in harmony with the decision of the Florida Supreme Court in **Jefferson County v. Hawkins**, 23 Fla. 223, 2 So. 362.

No contrary decision has been cited by the respondents.

For the Circuit Court of Appeals to rest its decision upon the conclusion that the case of **Sullivan v. City of Tampa**, 101 Fla. 298, 134 So. 211, did not deal with "deferred or accumulated interest coupons" and "the proportion of them which could be paid in the event of call and redemption of the bonds before maturity" is to make too narrow and technical an application of the **Sullivan** decision.

• What was actually determined there was:

"The constitutional amendment unquestionably authorizes the issuance of refunding bonds without a vote of the people, and this court would not be authorized to add to the language of the constitutional amendment a condition not therein expressed; that is, by addition of a provision that such refunding should not be permitted unless the refunding bonds should bear no higher rate of interest than the original obligation and should not be sold for less than their full par value. It is the function of this court to construe and interpret constitutional amendments and not to make them. The constitutional amendment plainly provides for the issuance of refunding bonds issued exclusively for the purpose of refunding the bonds or the interest thereon of such counties, districts, or municipalities. The dictionary meaning of the word 'refund' is 'to fund again or anew; to replace (a fund or loan) by a new fund.' It is also a matter of common knowledge that refunding obligations cannot always be accomplished without holding out to the creditor some inducement in the form of an increase in the rate of interest or otherwise.

which would cause him to be willing to surrender his existing bonds and take the refunding bonds instead.

"It will be noticed that the only limitation upon the power of counties, districts, and municipalities to issue refunding bonds which is contained in the constitutional amendment is that such bonds be issued exclusively for the purpose of refunding the bonds or the interest thereon of such counties, districts or municipalities. The constitutional provision contains no express language which purports to fix or limit the rate of interest which the refunding bonds shall bear, or to fix the price at which they may be sold. Being wholly silent as to such matters, and no limitations being clearly implied from the use of the terms in the amendment itself, none will be implied by the court. . . . It is quite probable that the difference between the amount which may be realized from the sale of the refunding bonds and the amount of the original obligations which are to be refunded must be paid out of the general funds of the city, but if this is done, it will not increase the bonded debt of the city."

Petitioners having acquired their contract rights after this pronouncement by the Florida Supreme Court, and after that court had adopted the principle announced in the case of Gelpcke v. Dubuque, 1 Wall. (U.S.) 175, (see Columbia County Commissioners v. King, 13 Fla. 451), and the Florida Court having adhered to that principle consistently ever since, petitioners' rights are not to be abrogated because of the holding of the Florida Supreme Court in the case of Outman v. Cone, 141 Fla. 196, 192 So. 611, and the other cases upon which respondents rely, simply because some of these later decisions did deal with deferred interest coupons and the proportion of them to be paid in the event of call and redemption of refunding bonds before their maturity.

It is respectfully submitted that the majority of the Circuit Court of Appeals is laboring under a misapprehension

in adopting the conclusion that for the Federal Courts to decide this case would be for them to undertake "to declare the public policy of the state in respect of obligations of its municipalities."

We are not asking the Federal Courts to declare what the policy of the state in any respect shall be, but only that the Federal Courts will declare the contract rights of petitioners, who have acquired such rights in reliance upon a decision of the highest Court of the State, and determine how much money the municipality must pay these petitioners upon calling their bonds in advance of their maturity.

Respondents state that the action of the Circuit Court of Appeals in remitting petitioners to the State Courts for a determination of their rights accords with the action of this Court in **Thompson v. Magnolia Petroleum Company**, 309 U. S. 478, 60 S. Ct. 628, and **Wichita Royalty Company v. City National Bank**, 306 U. S. 103, 59 S. Ct. 420.

In **Thompson v. Magnolia Petroleum Company**, the opinion states that "neither statutes nor decisions of Illinois have been pointed to which are clearly applicable."

Here, petitioners have been able to point to the case of **Sullivan v. City of Tampa**, 101 Fla. 298, 134 So. 211, as clearly settling the question presented by what respondents refer to as "the principal prayer of petitioners," especially when considered in the light of the adoption by the Florida Supreme Court of the principle announced in **Gelpcke v. Dubuque**, 1 Wall (U.S.) 175.

On the other question, petitioners have been able to cite as determinative the case of **Jefferson County v. Hawkins, Trustee**, 23 Fla. 223, 2 So. 362, and respondents have cited no contrary decisions.

In **Wichita Royalty Company v. City National Bank**, both the Circuit Court and this Court decided the questions presented, rather than remitting the parties to their remedy in the State Courts.

This Court did not, as stated by respondents, "reverse" the Fifth Circuit Court of Appeals, "because it did construe

a later Texas decision as a reversal of an earlier one," or for any other reason.

On the contrary, this Court affirmed the Circuit Court of Appeals, but held that the decision of the highest Texas court in the particular case, had declared "the law of the case," and that "the law of the case," so determined, was not to be departed from because of a later decision of the same court in another case.

The respondents attempt to distinguish this case from the case of **Gelpcke v. Dubuque, 1 Wall (U.S.) 175.**

They state that the Supreme Court of Iowa first held constitutional a statute of that state authorizing the City to issue bonds, and plaintiff purchased his bonds in reliance upon the statute and decision, after which the Supreme Court of Iowa expressly reversed its former decision and held the statute unconstitutional and the bonds void.

This case presents a similar situation.

In **Sullivan v. City of Tampa, 101 Fla. 298, 134 So. 211,** the Supreme Court of Florida held that the provisions contained in amended **Section 6, Article IX, of the Florida Constitution,** adopted at the general election held November 4, 1930, did not deprive a municipality of the power to issue refunding bonds bearing a rate of interest greater than that borne by the obligations refunded, without a freeholder vote.

In this state of the law, the City of Winter Haven issued the refunding bonds now held by the petitioners.

Subsequent to the issuance of the Winter Haven refunding bonds, the Supreme Court of Florida has done what it held in the **Sullivan case** it could not do, that is, it has read into the constitutional amendment, by implication, a proviso to the effect that a refunding bond, not authorized at a freeholder election, must bear a lower rate of interest than the bond refunded; otherwise, the necessary expense of refunding, added to the existing interest rate, would increase the obligation of the bond and prevent the bond from being such a refunding bond as is contemplated by the provision

of the constitutional amendment permitting only refunding bonds to be issued without an approving election. The Court therefore held that a provision in a refunding bond contract for the payment of deferred interest at the original rate, less previous payments, where the refunding bonds had not been authorized by the freeholders, was illegal and void.

It is thus seen that this situation is quite similar to that involved in the **Gelpcke case**.

The respondents further attempt to distinguish the **Gelpcke case** by pointing out that the contract before the Court in the **Sullivan case** did not deal with the specific subject of deferred interest coupons, with provisions for redemption similar to those contained in the Winter Haven bonds.

In doing so, however, they take a narrow and technical position, instead of conceding the broad general principle announced in the **Sullivan case**.

In the next place, respondents state that in **Miami v. State**, 139 Fla. 598, 190 So. 774, the Florida Supreme Court "implied" that there was no inconsistency in the decisions because of the differences in the factual situation involved.

Even if there is no inconsistency between **Sullivan v. Tampa**, and **Miami v. State**, the same cannot be said of the cases of **Sullivan v. Tampa**, on the one hand, and **Outman v. Cone**, and the subsequent cases, on the other hand.

Again, respondents take the position that, simply because the bonds involved in the **Sullivan case** were issued under the **General Refunding Act of 1927**, while those involved in this case were issued under the **General Refunding Act of 1931**, and the two refunding acts are not identical in all respects, there is no repugnancy between the **Sullivan case** and the later cases.

But this is a distinction without a difference, since the main features of the two refunding acts are the same.

The fact that the **General Refunding Act of 1931** does not expressly state that the municipality may pay a portion of the deferred interest on calling refunding bonds before

their maturity does not affect the constitutional question involved.

Finally, the respondents contend that the later cases are in harmony with a long line of Florida decisions holding that various plans, schemes, or provisions, that were intended to evade the prohibition against issuing bonds, other than refunding bonds, without an election, are void:

But this case does not involve a plan, scheme or provision to evade the constitutional prohibition against issuing bonds, other than refunding bonds, without an election.

What is involved is a plan whereby the refunding bond takers, who were induced by the City to surrender their noncallable bonds and accept callable bonds in their stead, were to be allowed to recover a portion of the deferred interest, in the event their new bonds should be called before their maturity.

The respondents take the position that the decision in the case of **Andrews v. Winter Haven**, 148 Fla. 144, 3 So. 2nd 805," denied to a Florida holder of bonds of the same issue, the principal prayer of petitioners."

The following facts must be borne in mind in connection with that decision.

1. The **Andrews case**, although purportedly brought by a bondholder, for the purpose of establishing the validity of the deferred interest provisions of the Winter Haven 1933 refunding bonds, was actually brought by a litigant who was a substantial property owner and taxpayer of the City of Winter Haven, whose property holdings were at least as extensive as his bond holdings, while petitioners own no property in the City.

2. No process was issued in the **Andrews suit**, but the pleadings of all the parties were filed, the argument held, and the decree signed and filed, all in the course of a single morning, and it is difficult to conceive how the **Andrews case** could have been an adversary proceeding.

3. The briefs filed on behalf of George Andrews, purporting to protect the interests of the bondholders, made

no reference to the case of **Sullivan v. City of Tampa**, or any other cases which had been decided by the Supreme Court of Florida, prior to the time of the issuance of the 1933 Winter Haven refunding bonds.

4. No effort whatever was made on behalf of George Andrews to direct the attention of the Florida Supreme Court to the fact that it had announced and declared a contrary principle of law, prior to the time when the Winter Haven, 1933 refunding bonds were issued, or to invoke the doctrine of both the State and Federal Courts that the law to be applied in considering a contract is the law which existed and had been judicially declared at the time when the contract was made.

5. The entire bond contract was not submitted to the Court in the **Andrews case**.

Respondents contend that the express agreement to pay a portion of the deferred interest, upon call of the bonds in advance of maturity, is void.

They then pose the question: "How can a court of equity in the exercise of its conscience compel the payment of more than would be due under the contract if it were valid?"

Judge Sibley has decided that justice can be done by holding that "so much interest promised in the old bond ought to be paid as would make good the loss caused by the partial unenforceability of the new bond."

Respondents state that Judge Sibley thought that the question of whether the plaintiffs should, by the resolution authorizing the issuance of the 1933 refunding bonds, be subrogated to their rights as holders of original bonds was not ruled upon by the Florida Court.

What Judge Sibley actually said was that this question had not been **foreclosed** by the decision in the **Andrews case**, because the refunding resolution was not in that record and not considered by the Court.

Since the position contended for by the petitioners is entirely consistent with the holding of the Supreme Court of Florida in **Jefferson County v. Hawkins**, it is respectfully

submitted that the Circuit Court of Appeals should have decided this case itself, instead of remitting the plaintiffs to their right to bring a new suit in the State Court.

CONCLUSION

It is submitted that there is no valid reason why this case should not have been decided by the Federal Courts, where the questions involved have been fully litigated by the parties at interest, without objection or protest, and that the case presents questions of grave public interest that need to be decided by our highest Court.

Respectfully submitted,

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